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No. 91-1562

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

INDIVIDUAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Jewel Food Stores is a grocery retailer in the Chicagoland area employing approximately 15,000 clerks, who are represented for labor relations purposes by Local 881 of the United Food and Commercial Workers' International Union. In September 1982, Jewel and the Union began negotiating for a new collective bargaining agreement (CBA) to replace the existing agreement. Those negotiations concluded with an agreement on January 27, 1983, which was reduced to writing, submitted to and ratified by the Union membership. The agreement contained fixed provisions over its 33-month term for the fundamental issues of wages and benefits. The agreement was to last until 1985.

On February 26, 1984, Jewel unilaterally implemented wage and benefit cuts to levels below those called for in the CBA. The Union protested to the NLRB and filed suit to compel arbitration of the dispute. Some 18 months later, the dispute was settled. The settlement provided for partial back pay and restoration of benefits, but at the insistence of Jewel, only those persons still employed by Jewel at that time were included in the settlement. The present individual Respondents represent the class of all the employees who suffered economic harm from Jewel's cuts and who were excluded from the settlement.

Jewel's wage cuts were implemented under a claim of right. Jewel claimed that, during the CBA negotiations, it was induced to drop its demand for a Favored Nations provision by the Union's promise to reopen the economic provisions of the CBA when Cub Foods, a warehouse-type competitor, entered the Chicago market. Jewel's negotiators claimed that, on the final day of negotiations, in a hallway conference, the local Union president offered

a full economic reopener, with both sides reserving the right to economic recourse, upon the entry of Cub into the market. The Union president's testimony regarding the hallway conversation was substantially contradictory: he claimed that he assured Jewel's representatives that the Union would be cooperative and would listen seriously in the event that Jewel experienced difficulties from competition by Cub, but that no reopener agreement was made. In any event, Jewel agreed to drop its demand for the Favored Nations provision.

There was no reference to this purported reopener in the CBA, the correspondence between Jewel and the Union setting forth areas of agreement outside the CBA, or internal Jewel memoranda. The only written reference to a reopener in the records contemporaneous to the negotiations was in the negotiating notes of the Jewel committee, some of which contained absolutely identical language although purporting to have been written by different individuals. In contrast, the Union notes makes no reference whatsoever to such an agreement.

In December 1983, Jewel contacted the Union, which resulted in a series of meetings being held. Jewel claimed those meetings were pursuant to the claimed reopener. The Union thought the meetings related to Jewel's request for a mid-term contract concession. Several of the meetings involved professionally produced presentations regarding the threat Jewel perceived from Cub Foods. Jewel's proposals for wage and benefit cuts were not accepted. On February 15, 1984, Jewel advised that it was presenting its final offer at impasse. Jewel had declared this impasse one day after the expiration of the 60 day "cooling off" period established under 29 U.S.C. § 158(a)(4). Implementation followed on February 26, 1984, without the consent of the Union. The Union litigated against

Jewel. Because these Respondents were not parties to the resolution of those proceedings, they independently filed this action.

Respondents original two count complaint was against both Jewel and Union Local 881. It was a hybrid action brought under section 301 of the Labor Management Relations Act (29 U.S.C. § 185). Respondents alleged that Jewel breached the CBA by reducing wages and benefits, and that the Union breached its duty of fair representation by failing to include Respondents in the settlement.

Respondents thereafter amended their complaint to plead a direct breach of contract count against Jewel. The District Court granted summary judgment in favor of the Union on the fair representation claim, holding that the Union had no duty of fair representation to former employees. *Merk v. Jewel Food Stores*, 641 F.Supp. 1024 (N.D. Ill. 1986). The Seventh Circuit affirmed on interlocutory appeal. *Merk v. Jewel Food Stores*, 848 F.2d 761 (7th Cir. 1988) (*Merk I*). This Court denied Jewel's petition for writ of certiorari from that decision. *Jewel Food Stores v. Merk*, 488 U.S. 956, 109 S.Ct. 393 (1988).

With the case now structured solely as a breach of contract action against Jewel, it proceeded to trial. The trial concluded in a jury verdict in favor of Jewel and against Respondents. Respondents thereafter took an appeal to the Seventh Circuit Court of Appeals, which ruled in favor of Respondents. *Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1991) (*Merk II*). The Seventh Circuit denied Jewel's petition for rehearing and suggestion for rehearing *en banc*. Jewel now files yet another interlocutory petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT RAISES NO ISSUES DEMANDING IMMEDIATE REVIEW BY THIS COURT.

When Jewel last sought this Court's grant of an interlocutory writ of certiorari in 1988, Respondents noted that the case presented a rare and unusual factual situation which did not warrant the Court's review. This Court agreed, and the petition for writ was denied.

Once again, Jewel comes before this Court on an interlocutory petition for writ of certiorari.[1] As this Court held in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), where the Court of Appeals remands a case, it is generally not yet ripe for review by the Supreme Court, and the petition for writ of certiorari should be denied. See also *Denver v. New York Trust Co.*, 229 U.S. 123 (1913); *Estelle v. Gamble*, 429 U.S. 97, 114-115 (1977) (Stevens, J., dissenting). We urge application of this principle here to deny Jewel's writ.

Furthermore, Jewel's petition does not qualify this case for review under the principles set forth in Supreme Court

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[1] Footnote 1 of Jewel's petition seemingly suggests that the present petition comes from a final judgment. Yet, this cannot be true. In the decision from which Jewel seeks the writ, the Court of Appeals explicitly remanded the case "for further proceedings consistent with this opinion". *Merk II*, 945 F.2d 889, 899. Although Jewel correctly notes that the effect of the Court of Appeals' decision is final on the issue of Jewel's *liability* to Respondents, the issue of Respondents' *damages* remains unsettled, and judgment for a specific monetary amount remains to be entered in Respondents favor by the District Court upon remand.

Rule 10.1(a) or 10.1(c). As a result, denial of Jewel's petition is mandated.

A. The Issues Raised are not of Sufficient Importance to Warrant Review.

Jewel sets forth reasons which, it suggests, put this case within the scope of Supreme Court Rule 10.1(a) or (c). As we shall show, a careful analysis of the Court of Appeals decision demonstrates that Jewel has woefully failed to bring this case within the extremely narrow confines which warrant this Court's exercise of jurisdiction. While *Merk II* may have "exceptional economic importance" for the approximately 15,000 members of Respondents' class, it cannot be characterized as having "exceptional legal importance" on an issue of federal law so as to require resolution by this Court.

Consider that Jewel does not even attempt to argue that *Merk II* has significant precedential value of nationwide import. How will the Court of Appeals decision impact management or labor in a general way? How does the ruling on the validity of a particular secret oral side agreement to a unique CBA alter the fundamental nature and validity of such agreements throughout the land? Jewel does not even raise these questions, let alone answer them. The reasons are patent: the answers to those questions vitiate any contention that this case has significance outside of its own peculiar and unique facts.

The outcome of this case turned entirely upon what the Court of Appeals described as:

> "* * * a secret deal at an informal hallway meeting late in the evening of January 23, 1983. The precise terms of that deal are in dispute: Union officials claim that all they promised was to 'sit and discuss' Jewel's competitive position once Cub Foods entered the Chi-

> cago market whereas Jewel executives contend that they agreed to an 'economic reopener with full reservation of rights.' " *Merk II*, 945 F.2d at 891.

The lower court's decision turned upon the secret nature of the purported agreement between Jewel and Union executives. The Court of Appeals made clear that its decision did not alter Section 8(d) of the National Labor Relations Act (29 U.S.C. § 158(d)), nor did it mandate that all CBA's must be written to be enforced. (*Merk II*, 945 F.2d at 895). Instead, under these narrow and unusual facts, the court decried the mutual efforts of Jewel and Union executives to keep the oral reopener from the rank and file membership despite its paramount significance. Clearly, it was the clandestine nature of these activities, and not some fundamental shift in national labor law, that led to the outcome below.

The precedential value of *Merk II* is therefore inherently limited. While Jewel might desire the forum of this Court in a last effort to obtain a favorable ruling, Jewel's economic desires are insufficient to warrant this Court's exercise of jurisdiction.

B. The Court of Appeals Decision is not in Conflict with Prior Decisions of Other Courts of Appeals.

The crux of the Court of Appeals holding begins with the indisputable proposition that labor contracts are accorded a special status, since a CBA is the charter instrument of the system of industrial self-government. Inherent in the fundamental policies of national labor law is the goal of stability. The Court of Appeals addressed the stability issue:

> "To avert industrial strife, collective bargaining agreements must be more secure than garden variety contracts. Accordingly, we hold that national labor

> policy forbids introduction of prior or contemporaneous *secret* agreements to contradict fundamental terms of a ratified collective bargaining contract." (Emphasis added). *Merk II*, 945 F.2d at 894.

No issue is more likely to breed instability than an unexpected mid-term disruption of the fundamental terms of a CBA: wages and benefits. Nonetheless, based upon a purported secret deal that allegedly modified those fundamental terms, Jewel attempted to deprive all of its employees, including these Respondents, of those contracted-for rights. Nearly eight years of litigation against Jewel by several plaintiff groups in several fora resulted. Nearly all were successful in defeating Jewel's illegal conduct. But, Respondents were excluded from those successes. The Court of Appeals decision in *Merk II*, relying upon substantial prior precedent, assured that the last of that litigation would reach an equivalent conclusion.

The analysis in *Merk II* properly begins with a citation to *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945). Because the holding of that case directly and negatively affects Jewel's position, Jewel attempts to overcome it by incorrectly suggesting *Gatliff* has "vanished without a trace". (Petition at 6).[2] Yet, *Gatliff* is far from being in the dustbin of legal history to which Jewel would assign it. Several subsequent cases (which are wholly ignored by Jewel) demonstrate that, rather than being an archaic principle of law, *Gatliff* has continued viability. See *Lewart v. Woodhall Care Center Associates*, 549 F.Supp. 879 (S.D.N.Y. 1982); *Local 509 v. Annshire Garment Co.*, 65

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[2] Consider the majority's comment to a similar suggestion of the dissent in *Merk II*: "The dissent is unable to find any case which holds *contra* to *Gatliff Coal*. That is probably because the principles of fairness underlying *Gatliff Coal* are still central to the labor law of the land." *Merk II*, 945 F.2d at 899.

L.L.R.M. 2769 (1967); *Restaurant Employees v. Lawrys Rhodes*, 580 P.2d 611 (Wash. 1978). See also *Local 1574 v. Gulf and Western Manufacturing Co.*, 417 F.Supp. 191 (D.Me. 1976) (concurring opinion); *Lewis v. Lowry*, 295 F.2d 197 (4th Cir. 1961) (dissenting opinion).

Consider the 1986 NLRB decision in *N.D.K. Corp. v. United Food & Commercial Workers' Union*, 278 NLRB 1035. There, an employer suggested its repudiation of a CBA was justified by secret agreement purportedly made by a union agent. Rejecting the enforceability of secret deals, the NLRB held

> "In implementing [federal labor] policy, courts accord labor contracts a special, protected status and do not judge them by the general principles applicable to common law contracts. (Cites omitted; *Gatliff* included). * * * In light of these precedents, it is clear that [employer] may not hide behind its affirmative defenses to elude its obligations under the collective bargaining agreement. If the purposes of the Act are to be served, it is the parties' signed and facially valid collective bargaining agreement which warrants insulation from attack and the sham agreement which must be nullified. To reach any other result would not only undermine federal labor policy; it would work a disservice to the NDK employees, the very beneficiaries of that contract whose interests the Act was initially designed to protect."

As noted by the Court of Appeals in this case, these fundamental principles of fairness in *Gatliff* are still central to the labor law of the land.

Jewel urges upon this Court the proposition that the lower court's decision perverts settled national labor policy and upsets decades of prior precedent. In large part, Jewel's argument in premised upon the Ninth Circuit's decision in *Ackley v. Western Conference of Teamsters*,

____ F.2d ____ (9th Cir., February 21, 1992). But, an analysis of *Ackley* shows it to have no relevance here.

In *Ackley*, the plaintiffs were two employees of Matlack Inc., an interstate hauling company. Plaintiffs and their co-workers were members of certain locals of the Teamsters union. Prior to 1988, these workers were covered by a multi-employer CBA which was to expire in June 1988. In 1987, Matlack notified the Teamsters of its intent to withdraw from this arrangement and to bargain independently with the union. The NLRB determined that the local unions would constitute a single collective bargaining unit. The union negotiators, in an attempt to counter Matlack's efforts to split the bargaining unit, agreed not to release information about the terms and conditions of the agreement until it was ready for ratification.

Last minute notices of ratification meetings on a proposed agreement were given by the union's local leadership on three occasions. The plaintiffs, who both were union stewards, requested but were denied information about the proposed agreement terms, or were given general summaries only. On the third attempt, the proposed agreement was ratified.

The plaintiffs sued Matlack and the Teamsters, alleging that the union's failure to disclose certain material changes in the CBA before ratification violated the equal voting rights and freedom of speech provisions of Section 101(a)(1) (29 U.S.C. § 411), thereby invalidating the CBA. After trial, the district court dismissed the claim.

The *Ackley* decision on appeal noted that Section 101(a)(1) was an anti-discrimination provision. To state a claim thereunder, a union member must prove a denial of rights accorded to other members. Since, in that case, the evidence showed that all union members got the same type and

amount of information as the plaintiffs, a claim could not be stated. As to the plaintiffs' claim that the union's withholding of information violated the statute's guarantees of free speech and assembly, the court noted that the plaintiffs failed to show they were denied the opportunity to express their views about the CBA, or were discouraged from asking questions.

Nothing in the *Ackley* holding, or the *ratio decidendi* which supported the holding, conflicts with the Court of Appeals decision in *Merk II*. Yet, Jewel has the temerity to mislead this Court when its asserts that *Merk II* is "fundamentally at odds with the Ninth Circuit's approach in *Ackley*". (Petition at 14). The *dicta* which Jewel lifted from the *Ackley* decision (Petition at 8-9) relates only to the scope of Section 101(a)(1) of the LMRDA—a statute wholly irrelevant to the claims asserted here by Respondents. And, *Ackley*'s discussion of the information disparity between negotiators and the rank and file, while perhaps a realistic view of the ratification process, can in no way be viewed as a statement of federal labor policy favoring clandestine agreements which alter the fundamental terms of a CBA submitted to the rank and file for a vote. Yet, that is precisely the outcome for which Jewel submits the *Ackley dicta* here. *Ackley* simply does not address the issues presented to the Court of Appeals in *Merk II*. Hence, it does not conflict with *Merk II*. Thus, neither its holding nor its discussion can possibly warrant this Court's jurisdiction under Supreme Court Rule 10.1(a).

Jewel next incorrectly suggests that *Merk II* subjects ratified labor agreements to stricter scrutiny than "garden variety contracts". If this were the holding of *Merk II*, it purportedly conflicts with standards adopted by other courts of appeals. Yet, consider the case law Jewel cites. A review shows Jewel's argument is wrong.

In *Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railroad Signalmen*, 882 F.2d 778 (3d Cir. 1989), the court held that it is appropriate for a district court to look beyond the face of a CBA when called upon to *interpret* a collective bargaining agreement. (Indeed, Jewel quotes the Third Circuit language in this regard). Our case does not involve the use of extrinsic evidence to *interpret* a CBA. Instead, as properly noted by the Court of Appeals in *Merk II*, our case involves an effort by an employer to effectively *overturn* the fundamental wage and benefits provisions of a CBA prior to that agreement's expiration, at substantial economic benefit to the employer and substantial economic detriment to the employees. And, Jewel's actions in this regard were entirely based upon a secret agreement. This is not a case in which the district court used the secret agreement to aid in its interpretation of an ambiguous provision of the CBA, to determine what was actually intended by the parties. This is a case in which the district court allowed the employer to rewrite the wages and benefits provisions of the CBA via the secret agreement. The Court of Appeals in *Merk II* properly prohibited such a result, as a matter of fundamental national labor policy first espoused in *Gatliff*.

For similar reasons, Jewel's citations to *International Union v. Racho Trucking Co.*, 897 F.2d 1248 (3d Cir. 1990); *Manville Forest Products Corp. v. United Paperworkers International Union*, 831 F.2d 72 (5th Cir. 1987); *Sepulveda v. Pacific Maritime Association*, 878 F.2d 1137 (9th Cir. 1989); *International Brotherhood of Electrical Workers v. Southern California Edison Co.*, 880 F.2d 104 (9th Cir. 1989); and *United Mine Workers v. Bituminous Coal Operators' Association, Inc.*, 898 F.2d 177 (D.C. Cir. 1990), are unavailing to establish the necessary conflict under Supreme Court Rule 10.1(a). Each of these cases

involves circumstances in which extrinsic evidence was used to *interpret* ambiguous terms of a collective bargaining agreement. As we have already noted, here Jewel was improperly allowed to introduce evidence of a clandestine side agreement to justify its refusal to honor the stated wage and benefits terms of the CBA. *Merk II* rightfully prohibits this result.

Jewel suggests that the Court of Appeals decision is in conflict with a prior ruling of the Seventh Circuit, *Mohr v. Metro East Manufacturing Co.*, 711 F.2d 69 (7th Cir. 1983). Yet, the Court of Appeals answered Jewel's contention in its opinion:

> "Ignoring this long line of precedent, however, the district court allowed introduction of the oral reopener to vary the terms of the written CBA. The district court relied upon *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, to buttress its holding. But our decision is not inconsistent with *Mohr*, which held only that the parol evidence rule does not prevent an individual employer from modifying an industry-wide collective bargaining agreement reached between an employers association and an international union by means of oral agreements with the union local. As the *Mohr* court observed:
>
> > The agreement between the association and the international union was deliberately left incomplete in recognition of the diversity of circumstances to which it had to apply, thus allowing individual employers and their local unions to add to the provisions, whether by supplemental written agreements, or oral agreements, or as in this case by both sorts.
>
> *Id.* at 72-73. Unlike the case at bar, the oral agreement in *Mohr* was not kept hidden from the Union membership. It dealt, moreover, with a purely peripheral matter regarding the terms of employment for schoolboys. Therefore, parol evidence was admissible

> in *Mohr* to supplement the general terms of the industry-wide collective bargaining agreement and to adapt them to local conditions." *Merk II*, 945 F.2d at 895.[3]

In summary, *Merk II* does not conflict with decisions from other courts of appeals on the issues presented. Jurisdiction under Rule 10.1(a) has therefore not been established.

C. The Court of Appeals Decision Does Not Conflict With Prior Decisions of This Court.

Jewel's next suggestion is that the decision in *Merk II* conflicts with purportedly analogous decisions of this Court, so as to create jurisdiction under Rule 10.1(c). Once again, Jewel's argument fails. Indeed, it is based upon an erroneous misreading of the cited cases.

On page 7 of its Petition, Jewel suggests that *Merk II* violates what Jewel describes as a directive of this Court found in *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 108 S.Ct. 364 (1987). In particular, Jewel suggests that *Misco* stands for the proposition that:

> "* * * considerations of public policy may preclude enforcement of collective bargaining agreements *only* where the contract would violate:
>
> > 'Some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest' ". (Petition at 7).

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[3] It is also interesting to note that the "long line of precedent" to which *Merk II* referred are those cases we cited above which demonstrate that Jewel is flatly wrong in suggesting that *Gatliff Coal Co. v. Cox* "vanished without a trace".

Yet, in no way does *Misco* stand for this proposition. In that case, this Court discussed the policy behind insulating a labor-management arbitration decision from judicial review. The language of *Misco* which Jewel recites relates to the narrow question of when a court can refuse to enforce an *arbitrator's award* under a CBA as being contrary to public policy. The entire quote of this Court, which Jewel conveniently fails to recite, states:

> "We caution, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant and is to be ascertained by reference to the laws and legal precedents and not from the general considerations of supposed public interest.' " *Misco*, 484 U.S. at 43.

Significantly, the case upon which this Court relied in *Misco*, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), also involved an arbitrator's award of back pay damages, and whether that award was unenforceable based upon a public policy argument. Both *Misco* and *W.R. Grace* are inapplicable to our case. Our case does not involve an arbitrator's decision, but instead involves a truly significant question of whether national labor policy will allow an employer to subvert the fundamental terms of a collective bargaining agreement, an agreement submitted to and ratified by the rank and file, based upon a secret side agreement. *Merk II* in no way conflicts with this Court's decisions in *Misco* and *W.R. Grace*.

Jewel's next argument is that *Merk II* ignores what Jewel characterizes as this Court's admonitions against *ad hoc* government interference with the NLRA's private bargaining system. In support of this position, Jewel cites *H.K. Porter Co. v. National Labor Relations Board*, 397 U.S. 99 (1970).

That case involved an examination of whether the National Labor Relations Board has the power to remedy an employer's alleged unfair labor practice by refusing to agree to "check off" the union dues of workers from their paychecks. This Court held that the Board did have such remedial powers, but that the Board was without the power to compel an employer or union to agree to any particular substantive contractual provision in a CBA. This Court supported that holding by reviewing the historical background of legislative enactments concerning labor-management activities. As part of that analysis, this Court made a statement Jewel quotes on page 7 of its Petition.[4] Here, at no time did Respondents seek, nor did the Court of Appeals involve itself in, dealings between the Union and Jewel as a "party to the negotiations". Instead, as is apparent from the holding of the Court of Appeals in *Merk II*, Respondents simply sought their legal remedies when, without justification, Jewel unilaterally violated the wage and benefit provisions of a ratified CBA, relying upon a theretofore undisclosed and surreptitious side deal.

This is not the type of governmental interference in the labor-management relationship which this Court decried in *H.K. Porter*. This is, by contrast, a proper resort to the judicial forum which exists to resolve such disputes. *Merk II* simply serves to implement a fundamental precept of national labor policy by precluding destabilization of settled collective bargaining agreements through undisclosed, unratified secret deals.

Jewel's Petition is replete with language lifted from various decisions of this Court, and the various Courts

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[4] "[I]t was never intended that the Government would * * * step in, become a party to the negotiations and impose its own views of a desirable settlement."

of Appeals which, out of context, might seem superficially supportive of Jewel's position. Yet, a careful reading of each case as to the specific facts, the entirety of the court's holding, and the context in which that language is found uniformly demonstrates that those cases do not support Jewel's position, let alone warrant this Court's acceptance of this case. *Merk II* conflicts neither with prior cases of other Courts of Appeals, nor with earlier decisions of this Court.

Jewel next suggests that *Merk II* will somehow require employers to monitor the ratification process before they can rely upon the provisions of a CBA. This simply is not so. As was eloquently stated by the Court of Appeals in *Merk II*:

> "Had the CBA embodied the entire agreement between the parties, this case would have been easily resolved. But the outcome of negotiations was not so straightforward." *Merk II*, 945 F.2d at 891.
>
> * * *
>
> "Yet Jewel and the Union explicitly collaborated to keep the oral reopener hidden from the rank and file membership despite its paramount significance. Thus Union members who reasonably believe that they were guaranteed a fixed rate of pay for duration of the CBA unexpectedly found their wages slashed at mid-term. Under these circumstances, enforcement of an oral reopener that was concealed and was held from ratification by the membership is certainly in derogation of national labor policy." *Merk II*, 945 F.2d at 896.

Distilled to its most simplistic statement, the Court of Appeals says nothing more than "if it is fundamental, and if it is secret, then you cannot rely upon it". The fact that the reopener was kept secret from the Union rank and file until February 26, 1984, when Jewel unilaterally implemented wage and benefit cuts to levels below those

called for in the CBA, the fact that the Union rank and file ratified what they perceived to be a wage and benefits contract fixed for a 33-month period, and the fact that Jewel engaged in active collusion with the Union in withholding the clandestine agreement from the rank and file are all critical facts which supported the Court of Appeals decision. Based upon the previously adopted rule announced in *Texaco v. NLRB*, 722 F.2d 1226 (5th Cir. 1984); *Meyerson v. Contracting Plumbers Association*, 606 F.Supp. 282 (S.D.N.Y. 1985); and *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1978), *Merk II* was properly decided.

On pages 9-12 of its Petition, Jewel cites several cases which allegedly conflict with *Merk II* relative to an employer's right to involve itself with the ratification process. In fact, no such conflict exists. None of the cases cited by Jewel involve circumstances where an employer sought to enforce an unratified *secret* agreement going to the very essence of a CBA (wages and benefits). That critical distinction sets this case apart. The policy of labor law must, as held by the Court of Appeals, seek to protect the rank and file from unscrupulous and collusive deals. Jewel asserts that it was powerless to require or insure ratification, lest it commit an unfair labor practice. However, the applicable labor statutes were never intended by Congress to provide a shield behind which an employer could hide its participation in illicit conduct. That is precisely the outcome Jewel seeks. *Merk II* properly prohibits this result.

After *Merk II*, a union may still enter into an agreement that it believes to be in the best, long term collective interests of its members, although that agreement might not enjoy their immediate, widespread support. The only proscription created by *Merk II* is against efforts to

rewrite the fundamental terms of a ratified CBA pursuant to a secret collusive deal. Contrary to Jewel's arguments, *Merk II* did not destroy "critical contract rights" held by Jewel.[5] As a matter of fundamental labor law, no right existed in Jewel in the first instance to void the fundamental terms of the CBA. Since that right never came into existence, no right was lost when Jewel's attempt to violate Respondents' economic rights was turned aside.

As its closing argument on the "reopener" issue, Jewel abandons its role as a principal player in the collusive deal, arguing that it was only a "bystander" while the Union was a "prime mover". (Petition at 17). The facts of this case demonstrate otherwise, as noted by the Court of Appeals. As an essential tenet of federal labor policy, the rights of *all* parties to the fundamental provisions of a collective bargaining agreement are upheld, and secret side deals affecting those fundamental terms are held unenforceable. The decision of the Court of Appeals was correct. That decision conflicts in no way either with the prior precedent of this Court, or with decisions of other Courts of Appeals. This Court's review of this matter is unwarranted. We respectfully urge this Court to decline to exercise jurisdiction over this matter.

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[5] It is interesting to note Jewel's suggestion that the secret "reopener" was a critical part of the CBA (Petition at 13). In the next breath, Jewel says that the secret deal did not contradict or change any conditions of employment. We wonder what comments Jewel's executives (or the attorneys representing Jewel) would make if they were advised in writing that Jewel would pay them a fixed amount of wages and benefits over an established term, only to have those wages and benefits dramatically and unilaterally reduced mid-term by Jewel without prior notice? The cavalier attitude reflected in Jewel's argument here is reflective of the posture Jewel has taken toward the rights of Respondents' class members going back to 1983.

II.

THE COURT OF APPEALS ACTED WITHIN ITS AUTHORITY BY OVERTURNING THE JURY'S VERDICT.

Only a brief response need be made to Argument III found on pages 17-19 of Jewel's Petition. Basing its contention on FRCP 50(a)(1), Jewel suggests that the Court of Appeals improperly failed to evaluate whether evidence existed to support the jury's finding that the reopener was enforceable. What Jewel fails to acknowledge is that the question of the enforceability of the reopener was not one for the trier of fact. Rather, as properly held by the Court of Appeals, the enforceability of the clandestine side deal was an issue of law for the court to decide in the first instance. Under the holding in *Merk II*, such secret deals will not serve to exculpate an employer from its breach of the clear and specific wage and benefits provisions of a CBA. If, as ruled by the Court of Appeals, evidence concerning the "reopener" was inadmissible, it matters not whether the jury thought the agreement was enforceable. As a matter of law, it could not be. Hence, the jury should never have decided the issue. And, since Jewel's only defense to Respondents' breach of contract claim was based upon the secret deal, the Court of Appeals properly rendered judgment on the liability issue in favor of Respondents.

III.

THE DECISION IN *MERK I* REGARDING THE UNION'S DUTY OF FAIR REPRESENTATION DOES NOT CONFLICT WITH PRIOR PRECEDENT.

At the outset, this Court should note that this is Jewel's second "bite at the apple" on this issue. The primary issue addressed to this Court by Jewel in its earlier petition for writ (*Jewel Food Stores v. Merk*, No. 88-523, October

1988 Term), was identical in all relevant respects to Issue IV of Jewel's present Petition. This Court properly denied Jewel's earlier petition; the advancing age of Jewel's argument has not given it any greater merit.

Jewel once again contends that *Merk I* conflicts with previous decisions of this Court which foster an exclusive mechanism for resolving disputes arising under a CBA. Jewel contends that since a grievance arose here under the CBA, its contractual enforcement procedures must control. However, this Court has never held that aggrieved employees must be limited to the contractual grievance procedures in all situations. To the contrary, this Court has frequently identified situations in which individuals with rights created under a CBA may proceed individually to vindicate their claims against a recalcitrant employer.

For example, *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), excuses the obligation to employ union remedies in situations where the employer repudiates the contractual arbitration procedures. In *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969), this Court held that an employee may proceed directly against his employer when the effort to proceed with formal contractual or administrative remedies would be futile. In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), this Court held that employee benefit fund trustees need not utilize the arbitration procedures contained in the CBA to enforce their rights under the agreement. These cases make clear that the preference for private dispute resolution is far from an absolute rule. Courts may, in appropriate circumstances, permit direct actions by aggrieved individuals for enforcement of a CBA. This Court has frequently held that the preference for union-mediated grievance and arbitration procedures will be put aside in those circumstances where reliance upon such procedures is not appropriate.

This is such a case. As we shall show, the position in which Respondents found themselves (as former employees) put them in a direct conflict in fact with the interests of the ongoing Union rank and file. Under such circumstances, the preferred route of union-mediated dispute resolution was not available to protect Respondents' interests.

A proper understanding of *Merk I* rests on a review of *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). *Pittsburgh Plate Glass* holds that the statutory definition of "employee" found in NLRA Section 2(3) (29 U.S.C. §152(3)) may not be separated from those rights guaranteed under Section 7 of the Act, particularly the right to bargain collectively in an appropriate unit. In seeking to determine whether retirees fit within the statutory definition of "employee", this Court reaffirmed that "in doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168. Looking to the policies underlying the Act, *Pittsburgh Plate Glass* established that the statutory definition of "employee" necessarily includes a community of interest analysis.

The essence of this analysis is the recognition that retirees' interests are inherently in conflict with the interests of active employees. As a result of this conflict, they may not be properly included within the collective bargaining unit with active employees. 404 U.S. 173. Inherent in the definition of "employee" under the NLRA is the notion that employees share common interests and goals and therefore may act together to bargain collectively or take other concerted action utilizing their economic weapons and advancing their economic interests. "The term 'employee' must be understood with reference to the purpose of the act and the facts involved in the economic relationship." 404 U.S. at 167.

Merk I and the District Court ruling which preceded it exclude Respondents from the definition of "employee" because Respondents lack the common interests and goals which the Act seeks to foster and protect. The retirees in *Pittsburgh Plate Glass* were not excluded from the definition of "employee" solely because they were no longer working. Importantly, as retirees, they lacked a community of interests with active workers sufficient to justify their inclusion in a common bargaining unit. The statutory definition of "employee" necessarily incorporates the notion of common interests. Where those interests materially diverge, appropriate individuals must be excluded from the bargaining unit.

A similar conclusion derives from the analytic framework developed in *Schneider*. There, this Court reasoned that the presumption of arbitrability (which *Republic Steel v. Maddox*, 379 U.S. 650 (1965), makes clear is intertwined with the union's duty of fair representation) is designed to further the national labor policy of peaceful resolution of labor disputes by requiring the parties to forego the economic weapons of strikes and lockouts. This Court refused to apply that presumption in the context of enforcing the terms of a collective bargaining agreement when the party seeking to enforce the agreement had no recourse to economic weapons.

> "Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all." 466 U.S. at 372.

Respondents here, like the retirees in *Pittsburgh Plate Glass*, have a narrow, single interest materially different from the rank and file represented by the Union in the

1985 settlement. They are a "functionally distinct minority", 404 U.S. at 172, interested solely in obtaining lost wages and benefits. The District Court here repeatedly emphasized the profound and inherent conflict which the Union faced in representing both active and former employees. *Merk v. Jewel Food Stores*, 641 F.Supp. 1024 (N.D. Ill. 1986). Respondents, like the trustees in *Schneider*, had no recourse to economic weapons. They are neither members of the Union nor employees of Jewel. While active members might reasonably forego the lost wages resulting from Jewel's unilateral wage and benefit cuts in exchange for more wages, benefits or job security in the future, Respondents had nothing to trade. They had no economic weapons at their disposal and so posed no threat to labor peace. Respondents' economic weakness undermines the logic supporting exclusive reliance on union-mediated grievance resolution. In the absence of this logic, there is no basis to mandate union-mediated procedures as the sole remedy. A direct action should be allowed.

The interaction of *Pittsburgh Plate Glass* and *Schneider* was carefully analyzed by the court in *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985), *cert. denied*, 471 U.S. 1102 (1985). The *Anderson* court concluded that retirees need not exhaust union-mediated contract grievance procedures and could pursue a direct action against the employer for breach of the collective bargaining agreement. The court analyzed the position of retirees to determine whether they had more in common with the trustees considered by the *Schneider* court or with active employees. The court followed the analysis used in *Pittsburgh Plate Glass* to conclude that retirees' interests often conflicted with those of active workers and that retirees have no recourse to economic weapons. Therefore, the court followed the lead of *Schneider* to determine that the presumption of arbitrability was not applicable.

The defendant in *Anderson*, like Jewel here, contended that *Maddox* and its progeny required union-mediated arbitration. The court rejected this contention:

> "The cases cited by Alpha do not justify letting a union mediate the interests of a 'functionally distinct minority' which can not be made part of the bargaining unit and which, as the Supreme Court pointed out, does not have a vote in union affairs." 752 F.2d at 1297.

The *Anderson* court properly concluded, like the lower courts here, that *Maddox* and its progeny are not applicable where there is a significant conflict between the interests of CBA beneficiaries. The *Anderson* analysis buttresses the lower court decisions in the present case as logical and appropriate extensions of the analysis used by this Court to define the scope and extent of a union's right and duty of exclusive representation. In this rare case where a functionally distinct minority of individuals exists, with a narrow interest in sharp conflict with the majority interests, the presumption in favor of exclusive representation must give way to the individual employees' ability to pursue a direct remedy against an employer who has breached the collective bargaining agreement. The District Court's holding that the right of exclusive representation and its correlative duty of fair representation are vitiated only when the plaintiffs are both ex-employees *and* have a serious conflict between their narrow interests and broader interests of active employees does not contradict the holdings of this Court or violate federal labor policy.[6]

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[6] This Court's decision in *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959) does not require a contrary holding. *Day*, decided under the Railway Labor Act of 1934 (45 U.S.C. §151) involved the compensation claims of a single locomotive engineer, brought

(Footnote continued on following page)

Jewel cavalierly attempts to avoid this inherent logic by arguing that Respondents' rights under the CBA grievance/arbitration provisions were not diminished upon Respondents' separation from Jewel. The economic decisions reached by the Union when it settled with Jewel, which led to this suit, demonstrate the fallacy of this contention. Far from being protected by the Union, Respondents were cast adrift, and are the only members of the class of Jewel employees in 1983-85 who have yet to receive the full benefit of contractually established wages and benefits.

In summary, Jewel's reiteration of this question in this second petition for writ fails to bring this case within the ambit of this Court's jurisdiction. We respectfully submit that the Petition should be denied.

IV.

THE COURT OF APPEALS CHOICE OF A FIVE-YEAR STATUTE OF LIMITATIONS FOR THIS CLAIM WAS APPROPRIATE.

The District Court held that Respondents' breach of contract action against Jewel was timely, applying the Illinois

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[6] *continued*

pursuant to the explicit terms of a CBA. The case did not involve an employer-union dispute over the validity of a CBA provision, as here, nor did it involve a conflict of interest between that plaintiff and other groups of employees. The sole issue was whether the retired engineer, dissatisfied with the decision of the National Railroad Adjustment Board on the same issue raised by others which was dispositive to his claim, could independently pursue a suit in court. This Court's decision that the retired engineer was bound by the Board's decision in no way establishes that Respondents here, in entirely dissimilar circumstances, are limited to the grievance/arbitration settlement the Union reached on behalf of active employees.

five year statute of limitations pertaining to oral contracts. In a thorough analysis of the Supreme Court decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the District Court concluded that application of the most analogous state statute was appropriate since Respondents' direct action against Jewel did not involve those "consensual processes that the federal labor law is chiefly designed to promote". *Merk v. Jewel Food Stores*, 641 F.Supp. 1024, 1035 (N.D. Ill. 1986). The District Court held that federal labor law would not be frustrated by application of the most analogous state statute of limitations.

Merk I did not directly address this issue, commenting favorably upon the District Court's holding only in a footnote. *Merk I*, 848 F.2d at 762, n. 2. Yet, importantly, *Merk I* noted that its then-recent decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), supported the District Court. Although it chose not to present this issue in its last interlocutory petition for writ of certiorari, Jewel has elected to address the question now.

In *DelCostello*, this Court adopted the six month statute of limitations found in § 10(b) of the NLRA (29 U.S.C. § 160(b)) in hybrid suits against an employer and union for breach of the duty of fair representation. However, this Court clearly stated it was not departing from the settled federal policy of borrowing the most analogous state statute:

> "We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal court should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. (Citations omitted). On the con-

> trary, as the courts have often discovered, there is not always an obvious state law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods." 462 U.S. 171, 172.

DelCostello reaffirmed the holding in *Autoworkers v. Hoosier Cardinal*, 462 U.S. 151 (1983), that a straightforward breach of contract action under § 301 should apply the six year Indiana limitations period for unwritten contracts. This Court stated:

> "We held [in *Hoosier*] that the suit was governed by Indiana's six-year limitations period for actions on unwritten contract; we resisted the suggestion that we establish some uniform federal period. Although we recognized that 'the subject matter § 301 is 'peculiarly on that calls for uniform law,' (citations omitted) we reasoned that national uniformity is of less importance when the case does not involve 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it.' (Citations omitted). We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach of contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direst or the relevant policy factors different:
>
> > The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law." 462 U.S. at 162, 163.

DelCostello clearly distinguished a straightforward suit for breach of contract under § 301 from a hybrid suit, finding that the federal labor policy which compels application of a shorter limitations period in a hybrid action would

not be present in a straightforward breach of contract suit.

> "The suit is thus not a straightforward breach of contract suit under § 301, as was *Hoosier*, but a hybrid § 301/fair representation claim, amounting to a 'direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement]." (Citations omitted). Also unlike the claim in *Hoosier*, it has no close analogy in ordinary state law." 462 U.S. at 165.

Jewel suggests our case constitutes an attack on the negotiation process, and not on Jewel's breach of the CBA, in an attempt to distinguish *DelCostello*. This contention has no merit. Respondents charged Jewel with violating the fundamental provisions of the CBA. Jewel defended by relying on the clandestine "reopener" agreement. Respondents challenged the legal validity of Jewel's defense, and ultimately won in the Court of Appeals. The negotiating *process* leading to the CBA, or to the supposed side deal, was never attacked by Respondents. Instead, Respondents only attacked Jewel's legal right to justify the CBA breach with the secret deal.

This case falls squarely within the *DelCostello* holding. The District Court's application of Illinois' five year limitations period, approved by the Court of Appeals in *Merk I*, was proper. Jewel has shown no reason for this Court to grant an interlocutory petition for writ under Rule 10.1 on this issue, which Jewel did not even deem worthy of asserting the last time it was before this Court.

CONCLUSION

For all of these reasons, Jewel has failed to show that this case warrants this Court's exercise of its jurisdiction. We respectfully urge this Court to deny this interlocutory petition, so as to allow this case to be remanded to the District Court for resolution of the remaining outstanding issue of Respondents' proper damages.

Respectfully submitted,

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